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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

HAROLD CARBAUGH,)	3:05-cv-00418-HDM-RAM
)	
Petitioner,)	
)	
vs.)	ORDER
)	
LENARD VARE, et al.,)	
)	
Respondents.)	
_____)	

I. Introduction

This action is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, by Harold Carbaugh, a prisoner at Lovelock Correctional Center, in Lovelock, Nevada. Petitioner is serving prison terms upon convictions of sexual assault on a child in violation of Nev. Rev. Stat. § 200.366 and lewdness with a child

1 under the age of 14 in violation of Nev. Rev. Stat. § 201.230.

2 II. Factual and Procedural Background

3 On February 12, 2003, following a jury trial in the state
4 court, the petitioner was convicted of one count of sexual assault
5 with a minor under the age of fourteen and six counts of lewdness
6 with a child under the age of fourteen. (Def. Exs. E & I).¹
7 Petitioner was sentenced to life sentences on all counts.² The
8 convictions resulted from sexual acts performed by the petitioner
9 on his great-grandniece ("the victim") on or between January 2000
10 and September 2001. (*Id.* Ex. B).

11 The relevant facts adduced at trial include the following.
12 Petitioner resided with the victim, her mother, and her
13 grandmother, among others, for several months between February 2000
14 and July 2000. (*Id.* Ex. 6 (Trial Tr. vol. 1, 128, 133-34, Aug. 6,
15 2002)). During that time, petitioner would take the victim to
16 school, pick her up, and help her with her homework. (*Id.* at 36-
17 37). In July 2000, petitioner moved out after severely hurting a
18 kitten belonging to the victim's mother. (*Id.* at 37-38, 133-34).

19 On September 18, 2001, the petitioner visited the victim's
20 residence. (*Id.* at 39, 134-35). He brought with him a laser light
21 toy for the victim's mother, who let the victim play with the toy.
22 (*Id.* at 40, 90). The victim took the laser toy into one of the
23

24 ¹ Respondents' exhibits were included in their motion to dismiss,
25 labeled A-T, and their answer to the petition, labeled 1-13.

26 ² Petitioner was sentenced to life sentences with the possibility
27 of parole after 10 years for each of the six lewdness counts, the
28 sentences running concurrently. He was sentenced to a life sentence
with the possibility of parole after 20 years on the sexual assault
count, the sentence to run consecutively to the sentences on the
lewdness counts. (Def. Ex. A 10).

1 bedrooms; petitioner joined her. (*Id.* at 40, 90). While they were
2 in the bedroom, the victim testified, petitioner felt the victim's
3 "private parts." (*Id.* at 92-94). At one point, the victim's
4 mother opened the door; inside she saw the petitioner lying on the
5 bed facing the victim and the victim quickly covering herself with
6 the sheets. (*Id.* at 43-44). Sometime later, the victim came out
7 of the bedroom. (*Id.* at 45). The petitioner followed about five
8 minutes later, tucking his shirt into his pants as he did. (*Id.* at
9 45, 152, 154). As the victim was going to bed that night, her
10 mother asked what she and petitioner were doing in the bedroom.
11 (*Id.* at 47). The victim said that petitioner had been kissing her
12 on the face and touching her private parts. (*Id.* at 47). She
13 demonstrated on a stuffed monkey where the petitioner had touched
14 her. (*Id.* at 138-39). The next day, the victim's mother and
15 grandmother took her to the hospital, where Dr. Theresa Vergara
16 examined her and found "definite evidence of sexual abuse." (*Id.*
17 Ex. 7 (Trial Tr. vol. 2, 22, Aug. 7, 2002)). Petitioner did not
18 testify, and his counsel rested without putting on any witnesses.
19 (*Id.* at 69).

20 On August 8, 2002, the jury returned verdicts, finding
21 petitioner guilty on all counts as charged. (*Id.* Ex. A, p. 7). On
22 September 4, 2002, petitioner filed a motion for new counsel. (*Id.*
23 Ex. 10). The court denied the motion, informing petitioner that
24 ineffective assistance of counsel was an issue for post-conviction
25 relief. (*Id.* Ex. A 8-9). On October 17, 2002, the petitioner was
26 sentenced. (*Id.* Ex. A 10). During the sentencing hearing,
27 petitioner raised a number of concerns about his attorney. (*Id.* Ex.
28 C 7-8).

1 Petitioner filed a direct appeal on November 8, 2002. (*Id.*
2 Ex. F). The appeal asserted that the district court erred first in
3 denying defendant's motion in limine to exclude evidence of prior
4 bad acts, and second in denying the defendant an opportunity to
5 cross-examine the victim's grandmother about a prior false
6 accusation of sexual misconduct committed against the victim. (*Id.*
7 Ex. J). The Nevada Supreme Court affirmed the judgment of
8 conviction on January 5, 2004. (*Id.* Ex. L).

9 Petitioner filed a state petition for habeas corpus relief
10 (post-conviction) on January 21, 2005, alleging that his counsel
11 was ineffective in a number of ways. (*Id.* Ex. N). The district
12 court found that the defendant failed to show the performance of
13 his counsel was deficient or that it prejudiced his defense and
14 accordingly denied defendant's petition. (*Id.* Ex. Q). Petitioner
15 appealed. (*Id.* Ex. R). The Nevada Supreme Court affirmed on July
16 6, 2005. (*Id.* Ex. S).

17 Petitioner then submitted a *pro se* petition for a writ of
18 habeas corpus to this court, initiating this action. The petition
19 contained 12 grounds for relief.

20 Respondents filed a motion to dismiss, arguing that a number
21 of petitioner's claims were either unexhausted or procedurally
22 barred. Specifically, respondents argued that Ground 12 of the
23 petition was unexhausted and that to the extent petitioner alleged
24 any claims beyond ineffective assistance of counsel within the
25 other 11 grounds those claims were procedurally barred. The Court
26 granted the motion and gave the petitioner a choice between
27 abandoning his unexhausted claim or dismissing the petition in its
28 entirety to exhaust the unexhausted claim. Petitioner elected to

1 abandon his unexhausted claim and proceed on his exhausted claims.
2 Respondents filed an answer to the remaining claims. Petitioner
3 has filed his reply and the matter stands submitted.

4 III. Federal Habeas Corpus Standards

5 28 U.S.C. § 2254(d), a provision of the Antiterrorism and
6 Effective Death Penalty Act of 1996 ("AEDPA"), provides the legal
7 standard for the Court's consideration of this habeas petition:

8 An application for a writ of habeas corpus on
9 behalf of a person in custody pursuant to the
10 judgment of a State court shall not be granted with
11 respect to any claim that was adjudicated on the
12 merits in State court proceedings unless the
13 adjudication of the claim -

14 (1) resulted in a decision that was contrary
15 to, or involved an unreasonable application of,
16 clearly established Federal law, as determined by
17 the Supreme Court of the United States; or

18 (2) resulted in a decision that was based on an
19 unreasonable determination of the facts in light of
20 the evidence presented in the State court
21 proceeding.

22 28 U.S.C. § 2254(d).

23 A state court decision is contrary to clearly established
24 Supreme Court precedent, within the meaning of 28 U.S.C. § 2254,
25 "if the state court applies a rule that contradicts the governing
26 law set forth in [the Supreme Court's] cases" or "if the state
27 court confronts a set of facts that are materially
28 indistinguishable from a decision of [the Supreme Court] and
nevertheless arrives at a result different from [the Supreme
Court's] precedent." *Lockyer v. Andrade*, 538 U.S. 63, 73
(2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000),
and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

A state court decision is an unreasonable application of

1 clearly established Supreme Court precedent, within the meaning of
2 28 U.S.C. § 2254(d), "if the state court identifies the correct
3 governing legal principle from [the Supreme Court's] decisions but
4 unreasonably applies that principle to the facts of the prisoner's
5 case." *Lockyer*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at
6 413). The "unreasonable application" clause requires the state
7 court decision to be more than incorrect or erroneous; the state
8 court's application of clearly established law must be objectively
9 unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

10 In determining whether a state court decision is contrary to,
11 or an unreasonable application of, federal law, this Court looks to
12 the state courts' last reasoned decision. See *Ylst v. Nunnemaker*,
13 501 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072,
14 1079 n.2 (9th Cir. 2000), *cert. denied*, 534 U.S. 944 (2001).
15 Moreover, "a determination of a factual issue made by a State court
16 shall be presumed to be correct," and the petitioner "shall have
17 the burden of rebutting the presumption of correctness by clear and
18 convincing evidence." 28 U.S.C. § 2254(e) (1).

19 IV. Ineffective Assistance of Counsel Standards

20 "[T]he right to counsel is the right to the effective
21 assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771
22 n.14 (1970). To prevail on an ineffective assistance of counsel
23 claim, the defendant must meet a two-prong test. *Strickland v.*
24 *Washington*, 466 U.S. 668, 687 (1984). First, the defendant must
25 show that his counsel's performance fell below an objective
26 standard of reasonableness. *Id.* at 687-88. "Review of counsel's
27 performance is highly deferential and there is a strong presumption
28 that counsel's conduct fell within the wide range of reasonable

1 representation." *United States v. Ferreira-Alameda*, 815 F.2d 1251,
2 1253(9th Cir. 1986); see also *Richter v. Hickman*, 2008 WL 943584,
3 at *3 (9th Cir. Apr. 9, 2008). "A decision not to investigate must
4 be assessed for reasonableness, applying a heavy measure of
5 deference to counsel's judgments." *Richter*, 2008 WL 943584 at *3.
6 Second, the defendant must show that the deficient performance
7 prejudiced his defense. *Strickland*, 466 U.S. at 687. This
8 requires showing that "there is a reasonable probability that, but
9 for counsel's unprofessional errors, the result of the proceeding
10 would have been different. A reasonable probability is a
11 probability sufficient to undermine confidence in the outcome."
12 *Id.* at 694.

13 A habeas corpus petitioner's disagreement with his counsel's
14 tactical decisions does not indicate ineffective assistance of
15 counsel. *Territory of Guam v. Santos*, 741 F.2d 1167, 1169 (9th
16 Cir. 1984). Further, "[f]ailure to raise a meritless argument does
17 not constitute ineffective assistance." *Boag v. Raines*, 769 F.2d
18 1341, 1344 (9th Cir. 1985), *cert. denied*, 474 U.S. 1085 (1986)
19 (citing *Cooper v. Fitzharris*, 551 F.2d 1162, 1166 (9th Cir. 1977)).
20 Finally, conclusory assertions not supported by a statement of
21 specific facts "do not warrant habeas relief." *James v. Borg*, 24
22 F.3d 20, 26 (9th Cir. 1994).

23 V. Analysis

24 Petitioner's petition for habeas corpus relief asserts
25 numerous claims for ineffective assistance of counsel, all of which
26 the Nevada Supreme Court, employing the *Strickland* standard, found
27 to be without merit.

28 First, petitioner alleges that his attorney was ineffective

1 because he failed to conduct any pretrial investigations even
2 though an investigator had been appointed to his case. The Nevada
3 Supreme Court held petitioner failed to show how any of the issues
4 counsel allegedly should have investigated would have assisted
5 petitioner's case or changed the outcome of the proceedings. The
6 court's decision was not contrary to or an unreasonable application
7 of *Strickland*. Most of the petitioner's allegations are vague and
8 conclusory and do not provide any specifics as to what evidence
9 counsel should have acquired through investigations. But even if
10 the court were to determine that counsel's performance was
11 deficient for failing to investigate, see *Reynoso v. Giurbino*, 462
12 F.3d 1099, 1112-13 (9th Cir. 2006), the evidence is insufficient to
13 persuade the court that the result would have been any different
14 had those issues been investigated and presented at trial.
15 Accordingly, petitioner's claim for relief on this count is denied.

16 Second, petitioner alleges that his attorney was ineffective
17 because he failed to file any pretrial motions other than a single
18 motion in limine. The Nevada Supreme Court held that petitioner
19 failed to show what motions should have been filed and how they
20 would have assisted in the trial proceedings. Having independently
21 reviewed the record, this court does not find that any other
22 pretrial motions would have been helpful to petitioner's case, and
23 his counsel's failure to file any was not deficient. Accordingly,
24 the Nevada Supreme Court's decision was not an unreasonable
25 application of *Strickland*, and petitioner's claim for relief on
26 this count is denied.

27 Third, petitioner argues that his counsel attempted to coerce
28 and induce him into pleading guilty. The Nevada Supreme Court held

1 that defense counsel gave the petitioner candid advice about the
2 risks of proceeding to trial, and more importantly that petitioner
3 did not plead guilty. The court's decision was not an unreasonable
4 application of *Strickland* because petitioner cannot show any
5 prejudice as he did not plead guilty. His claim for relief on this
6 count is denied.

7 Fourth, petitioner alleges that his attorney was ineffective
8 because he failed to interview the witnesses against him to
9 determine the factual basis for their claims or to discover any
10 impeachment information. The Nevada Supreme Court held that
11 petitioner failed to show how any of issues he thought counsel
12 should have investigated would have helped him in his case or
13 changed the outcome of the proceedings. It further held that the
14 impeachment information petitioner sought to have presented would
15 not have been admissible. The court's decision was not an
16 unreasonable application of *Strickland* because even if his attorney
17 had been permitted to interview the adverse witnesses, the
18 petitioner has failed to articulate what specific factual or
19 impeachment information would have been gleaned through witness
20 interviews. Petitioner's claim for relief on this count is denied.

21 Fifth, petitioner alleges that his attorney was ineffective
22 because he did not review the victim's medical reports. The Nevada
23 Supreme Court held this claim was not supported by the record
24 because counsel told the district court during trial that he was
25 familiar with the medical records. The court's decision was not an
26 unreasonable application of *Strickland* because petitioner has
27 provided no evidence to rebut his attorney's statement in court
28 that he had reviewed the medical records. Further, it is clear

1 from the trial transcript and counsel's questions of Dr. Vergara
2 that counsel did review the victim's medical records sufficiently
3 to cross-examine the medical expert. (Def. Ex. 7 (Trial Tr. vol.
4 2, 30-32, Aug. 7, 2002)). Therefore, petitioner cannot show that
5 his counsel's performance was objectively unreasonable, and his
6 claim for relief on this count is denied.

7 Sixth, petitioner alleges that his attorney was ineffective
8 because he did not consult with and obtain the testimony of a
9 medical expert to refute Dr. Vergara's findings. The Nevada
10 Supreme Court held that petitioner did not show what a different
11 medical expert would have testified to, or that it would have
12 changed the outcome of the trial. The court's decision was not an
13 unreasonable application of *Strickland*. "A petitioner may not
14 simply speculate about how an unretained expert witness would
15 testify, but must adduce evidence to show what the testimony would
16 have been." *Smith v. Schriro*, 2007 WL 779695, at *46 (D. Ariz.
17 Mar. 13, 2007) (slip copy) (citing *Grisby v. Blodgett*, 130 F.3d
18 365, 373 (9th Cir. 1997)). Here, petitioner has not shown that
19 another medical expert would have determined or testified that the
20 victim's injuries resulted from something other than sexual abuse
21 and only speculates that the result might have been different.
22 Further, petitioner's counsel was not appointed until April 3,
23 2002, several months after the victim was examined by Dr. Vergara.
24 Accordingly, petitioner has not shown how the outcome of the
25 proceedings would have been different, and his claim for relief on
26 this count is denied.

27 Seventh, petitioner alleges that his attorney was ineffective
28 because he did not interview or present favorable witnesses who

1 would support the petitioner's version of the facts and would
2 impeach the accusing witnesses. According to the petitioner, a
3 number of the witnesses he lists would have testified that the
4 victim's grandmother had previously made false accusations
5 regarding sexual abuse on the victim in the past, others would have
6 contradicted the testimony of the accusing witnesses on a number of
7 collateral issues, and still others may have had "relevant or
8 exculpatory information." The Nevada Supreme Court held that
9 petitioner failed to show how any of the collateral issues he
10 thought counsel should have investigated would have helped him in
11 his case or changed the outcome of the proceedings. It further
12 pointed out that evidence of a witness' reputation for truthfulness
13 is not admissible and that specific instances of conduct may not be
14 proven by extrinsic evidence. The court's decision was not an
15 unreasonable application of *Strickland*. "[E]vidence about the
16 testimony of a putative witness must generally be presented in the
17 form of actual testimony by the witness or on affidavit. A
18 defendant cannot simply state that the testimony would have been
19 favorable; self-serving speculation will not sustain an ineffective
20 assistance claim." *United States v. Ashimi*, 932 F.2d 643, 650 (7th
21 Cir. 1991). Petitioner provides only vague and conclusory
22 assertions about what most of the listed witnesses would testify
23 to, and as to the others he does not provide any affidavits or
24 other evidence showing what their testimony would have been.
25 Accordingly, petitioner cannot show any prejudice to his defense
26 and his claim for relief on this count is denied.

27 Eighth, petitioner alleges that his attorney was ineffective
28 because he did not obtain or present any documents supporting his

1 defense. Petitioner has not shown that any of the documents he
2 identifies existed and has not explained how they would have helped
3 his case or been relevant to the issues at trial. Therefore, the
4 Nevada Supreme Court's denial of his ineffective assistance of
5 counsel claim on this issue was not an unreasonable application of
6 *Strickland*, and petitioner's claim for relief on this count is
7 denied.

8 Ninth, petitioner alleges that his attorney was ineffective
9 because he failed to object to biased and potentially prejudicial
10 comments made by prospective jurors regarding their past
11 experiences with sexual misconduct. The Nevada Supreme Court held
12 that petitioner's claim was not supported by the record because
13 "[a]ll potential jurors who had expressed prejudice due to prior
14 experiences with sexual molestation were excused" and all remaining
15 jury members said they could be fair and impartial. The court's
16 decision was not an unreasonable application of *Strickland* because
17 petitioner has failed to show that any bias infected the jury or
18 that the outcome of the proceedings would have been different if
19 counsel had objected to the statements. Therefore, petitioner's
20 claim for relief on this count is denied.

21 Tenth, petitioner alleges that his attorney failed to move to
22 dismiss the sexual assault charge based on insufficient evidence.
23 The Nevada Supreme Court held that not only did the victim testify
24 that she had never injured herself, but Dr. Vergara also testified
25 she found definite evidence of abuse and that urine tests were
26 negative for infection. The court's decision was not an
27 unreasonable application of *Strickland*. The victim testified that
28 the petitioner had touched her, the victim's mother and grandmother

1 testified that the victim reported the touching to them that same
2 night, and Dr. Vergara testified that she found definite signs of
3 sexual abuse occurring within 24-48 hours of the examination. In
4 light of this, it is unlikely a motion to dismiss based on
5 insufficient evidence would have been granted. As petitioner has
6 not shown prejudice to his defense, his claim for relief on this
7 count is denied.

8 Eleventh, petitioner alleges that his attorney failed to
9 adequately confront and cross-examine the victim and the medical
10 expert regarding alternative ways the victim could have injured
11 herself other than from molestation. He also alleges his attorney
12 failed to impeach the testimony of the victim's mother and
13 grandmother on various issues. The Nevada Supreme Court held the
14 victim testified she'd never hurt herself where petitioner had
15 touched her, and the medical expert stated that there was "definite
16 evidence of sexual abuse" and that urine tests were negative for
17 infection. The court's decision was not an unreasonable
18 application of *Strickland* because petitioner's counsel's behavior
19 did not fall outside the wide range of reasonable representation.
20 The victim was asked by the prosecutor whether she had done
21 anything to hurt herself and she answered "no." (Def. Ex. 6 (Trial
22 Tr. vol. 1, 107, Aug. 6, 2002)). Defense counsel did not have to
23 ask the question again. Further, counsel asked the medical expert
24 whether the victim's injury could have been caused by something
25 else, including poor hygiene; the expert granted it was possible
26 (although very unlikely). (*Id.* Ex. 7 (Trial Tr. vol. 2, 30, Aug.
27 7, 2002)). Counsel's tactical decisions, such as not asking a
28 particular line of questions on cross-examination, are given great

1 deference and must only be objectively reasonable. *Dows v. Wood*,
2 211 F.3d 480, 487 (9th Cir. 2000). Counsel's method of cross-
3 examination was objectively reasonable, and therefore petitioner's
4 claim for relief on this count is denied.

5 Twelfth, petitioner alleges that his attorney was ineffective
6 because he told the petitioner he was not allowed to testify at
7 trial and barred him from doing so. The Nevada Supreme Court held
8 the petitioner was canvassed on his right to testify and to not
9 testify, and that a cautionary instruction was given to the jury.
10 The court's decision was not an unreasonable application of
11 *Strickland* because the court asked petitioner whether he had
12 discussed his right to testify with his attorney and petitioner
13 responded "yes." (Def. Ex. 7 (Trial Tr. vol. 2, 54, Aug. 7,
14 2002)). Therefore, petitioner can show neither prejudice nor that
15 his counsel's conduct fell outside the wide range of reasonable
16 representation. Petitioner's claim for relief on this count is
17 denied.

18 Thirteenth, petitioner alleges that his attorney was
19 ineffective by failing to object to the criminal information
20 because it gave insufficient notice of the charges against him.
21 Specifically, petitioner claimed the criminal information did not
22 provide specific dates of the alleged crimes, stating only that
23 they were committed by the petitioner on or between January 2000
24 and September 2001. The Nevada Supreme Court held that specific
25 dates do not have to be charged unless time is an element of the
26 crime, time is not an element of the crimes of lewdness with a
27 minor and sexual assault, and "the State could not be expected to
28 provide anything other than approximate dates" where, as here, the

1 victim was five or six years old at the time of the crimes. (Def.
2 Ex. S 3-4). The court's decision was not an unreasonable
3 application of *Strickland* because the information sufficiently
4 alleged the charges against the petitioner and thus his counsel's
5 failure to object did not fall outside the wide range of reasonable
6 representation and did not prejudice his defense. Petitioner's
7 claim for relief on this count is denied.

8 Fourteenth, petitioner alleges that his attorney was
9 ineffective because he failed to object to the jury instructions,
10 which also omitted the specific dates of the crimes at issue. The
11 Nevada Supreme Court held the parties stipulated in open court that
12 the instructions had been settled, and that the state was not
13 required to prove each instance of abuse because of the victim's
14 young age. Further, the court noted that separate acts of sexual
15 abuse committed as part of a single criminal encounter may be
16 charged separately, and that the jury found reliable indicia that
17 the acts had occurred. The court's decision was not an
18 unreasonable application of *Strickland* because petitioner has
19 failed to show the instructions were improper and thus has failed
20 to show that an objection would have changed the outcome of the
21 proceedings. Accordingly, petitioner's claim for relief on this
22 count is denied.

23 Fifteenth, petitioner alleges that his attorney was
24 ineffective because he failed to object to the government's
25 inappropriate and prejudicial statements made in its opening and
26 closing arguments. The only specific statements petitioner points
27 out are the prosecutor's insinuations that the petitioner might
28 have been masturbating while he was in the bedroom with the victim

1 because when he exited the room he was tucking his shirt in. The
2 Nevada Supreme Court held the statements were based on evidence
3 presented at trial. The court's decision was not an unreasonable
4 application of *Strickland* because the prosecutor's statements were
5 speculation based on the evidence presented at trial and petitioner
6 has not shown that they "so infect[ed] the trial with unfairness as
7 to make the resulting conviction a denial of due process." See
8 *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal quotation
9 marks and citation omitted). Accordingly, the petitioner's claim
10 for relief on this count is denied.

11 Sixteenth, petitioner alleges that his attorney was
12 ineffective because he made inappropriate admissions of guilt
13 during closing arguments. Petitioner claims his attorney stated
14 that petitioner was guilty of the charges in 2001, but not those in
15 2000. The Nevada Supreme Court held that in fact petitioner's
16 attorney was addressing a statement by the victim that the
17 petitioner had not touched her before September 18, 2001. The
18 court's decision was not an unreasonable application of *Strickland*.
19 The record reveals that petitioner's counsel did not make any
20 admissions of guilt, but rather was discussing the impossibility of
21 guilt for one of the time frames involved. This was effective
22 advocacy, and necessarily had to be addressed given the evidence
23 presented at trial. Petitioner has not shown that his counsel's
24 performance fell outside the wide range of reasonable
25 representation, and therefore his claim for relief on this count is
26 denied.

27 Seventeenth, petitioner alleges that the district court erred
28 in refusing to grant his presentence motion for a new attorney, and

1 that his counsel was ineffective for failing to move to withdraw
2 once it was clear there was an irreconcilable conflict. The Nevada
3 Supreme Court held petitioner failed to show "there was an actual
4 conflict or that his counsel's performance was ineffective."
5 Further, the court held, "a criminal defendant is not entitled to
6 reject court appointed counsel and obtain substitution of counsel
7 at public expense absent a showing of good cause." The court's
8 finding was not an unreasonable application of *Strickland*. While
9 there is no right to a "meaningful attorney-client relationship,"
10 *Morris v. Slappy*, 461 U.S. 1, 13-14 & n.6 (1983), a defendant is
11 entitled to a substitution of counsel if, after a hearing, "it is
12 demonstrated that there is a breakdown in the attorney-client
13 relationship or that 'an actual conflict of interest existed,'" *Jackson v. Ylst*, 921 F.2d 882, 888 (9th Cir. 1990). A defendant is
14 not, however, entitled to automatic substitution of counsel merely
15 because he is dissatisfied with his attorney's performance. *Id.*
16 Petitioner's complaints about his relationship with his attorney
17 reflect only a dissatisfaction with his counsel's performance and
18 trial strategy, not an actual conflict of interest or complete
19 breakdown in the relationship. Accordingly, petitioner's claim for
20 relief on this count is denied.

22 Eighteenth, petitioner alleges that his attorney was
23 ineffective because he failed to object to the special sentence of
24 lifetime supervision. Specifically, he claims the sentence was
25 improperly imposed because it was not alleged in the criminal
26 information and was not based on facts found by the jury. The
27 Nevada Supreme Court held that imposition of the lifetime
28 supervision was mandatory under Nevada law. The court's decision

1 was not an unreasonable application of *Strickland* because
2 petitioner cannot show prejudice. Imposition of the sentence was
3 mandatory under state law, see Nev. Rev. Stat. § 176.0931(1), and
4 any objection to it would have been unfounded. Moreover,
5 petitioner's constitutional claims on this ground are without
6 merit. The special sentence of lifetime supervision was based on
7 the same facts as petitioner's conviction - facts that were found
8 by the jury. Accordingly, the petitioner's claim for relief on
9 this count is denied.

10 Finally, petitioner alleges that his attorney was ineffective
11 because he failed to give petitioner all documents relating to his
12 case so that he could prepare his habeas petition. The Nevada
13 Supreme Court held that petitioner failed to show what documents
14 petitioner requested that he did not obtain from counsel and how
15 they would have been helpful to his petition. The court's decision
16 was not an unreasonable application of *Strickland*. Other than the
17 trial transcripts, petitioner has not identified any documents he
18 requested from counsel that he did not receive. Because petitioner
19 was present during trial, he has firsthand knowledge of the
20 proceedings and therefore did not need the transcripts to file his
21 habeas petition. See, e.g., *Jihad v. Hvass*, 267 F.3d 803, 806 (8th
22 Cir. 2001). Petitioner's claim for relief on this count is denied.

23 The petitioner has failed to show that any part of the Nevada
24 Supreme Court's decision on his habeas corpus petition was contrary
25 to or an unreasonable application of Supreme Court precedent, or an
26 unreasonable determination of the facts. Accordingly, his petition
27 for a writ of habeas corpus is denied.

28 **IT IS THEREFORE ORDERED** that the petition for writ of habeas

1 corpus in this action (#7) is **DENIED**.

2 **IT IS FURTHER ORDERED** that the Clerk shall **ENTER JUDGMENT**
3 **ACCORDINGLY**.

4 DATED: This 4th day of June, 2008.

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7 UNITED STATES DISTRICT JUDGE
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